Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

NO. 79-1585

HOMER THEODORE TENCH,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[redacted] PETITIONER

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONER

The Petitioner, Homer Theodore Tench, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Fourth Circuit Court of Appeals.

OPINIONS BELOW

On February 8, 1980, the Fourth Circuit Court of Appeals rendered a decision denying the Petitioner's appeal. See Appendix A. On March 11, 1980, Petitioner's Motion for Rehearing was denied in the same Court. See Appendix B.

JURISDICTION

Jurisdiction of this appeal is grounded on a February 8, 1980 decision of the Fourth Circuit Court of Appeals. The statutory provision conferring jurisdiction for this appeal is 28 U.S.C. 1254.

QUESTION PRESENTED FOR REVIEW

PURSUANT TO FEDERAL RULE OF EVIDENCE 104, WHETHER A PRELIMINARY EVIDENTIARY HEARING MUST BE HELD OUTSIDE THE PRESENCE OF THE JURY IN ORDER TO DETERMINE IF INDEPENDENT EVIDENCE OF A CONSPIRACY EXISTS TO JUSTIFY ADMISSION OF CO-CONSPIRATOR HEARSAY STATEMENTS PURSUANT TO FEDERAL RULE OF EVIDENCE 801.

PREFATORY STATEMENT

All references to the record in this case, which was filed simultaneously with Petitioner's brief, will be preceded by the capital letter "R".

STATEMENT OF THE CASE

Petitioner was charged with six other people with conspiracy to possess with intent to distribute cocaine, a Schedule II controlled substance, in violation of the provisions of Title 21, United States Code, Section 841(a)(1); and, with conspiracy to unlawfully distribute cocaine in violation of the provisions of Title 21, United States Code Section 841(a)(1).

Petitioner filed on January 29, 1979, a Motion for a Preliminary Hearing outside the presence of the jury, for the purpose of determining whether co-conspirator declarations were admissible. (R-199). At the beginning of trial,

prior to the taking of any evidence, the motion was renewed orally. (R-35). At that time, it was denied. (R-37). The Petitioner was subsequently convicted of the crimes charged on the evidence presented, which included statements from unindicted co-conspirator, Rutherford, who escaped prior to trial. Notice of Appeal was filed on April 4, 1979. On February 8, 1980, the Petitioner's appeal was denied. Subsequently, a Motion for a Rehearing was filed, which was also denied.

REASON FOR GRANTING THE WRIT

CLARIFICATION AS TO THE NECESSITY OF HOLDING A PRELIMINARY HEARING OUTSIDE THE PRESENCE OF THE JURY IN ORDER TO DETERMINE THE ADMISSIBILITY OF CO-CONSPIRATOR HEARSAY STATEMENTS IS NECESSARY AS THERE EXISTS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER SUCH A HEARING IS NECESSARY AND AS THIS ISSUE IS NECESSARY FOR A PROPER DETERMINATION OF THE PROCEDURES TO BE ADOPTED IN ORDER TO PROPERLY IMPLEMENT FEDERAL RULE OF EVIDENCE 104(a).

A. A PRELIMINARY HEARING SHOULD HAVE BEEN HELD OUTSIDE THE PRESENCE OF THE JURY IN REGARD TO WHETHER CO-CONSPIRATOR HEARSAY STATEMENTS ARE ADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 801(d)(2)(E).

Under the Federal Rules of Evidence, a statement is not hearsay if offered against a party, and is "a statement by a co-conspirator of a party made during the course and in furtherance of the conspiracy." Federal Rule of

Evidence 801(d)(2)(E). For the statements to be removed from the realm of hearsay, there must be a conspiracy, the statement in question must have been made during the course of and in furtherance of the conspiracy, and the declarant and the defendant must be members of the conspiracy. *United States v. James*, 590 F.2d 575, 578 (5th Cir. 1978). These matters can only be proved with evidence independent of that sought to be introduced under the hearsay exception. *United States v. McCormick*, 565 F.2d 286, 289 (4th Cir. 1977).

The various circuits have uniformly decided that the determination of the admissibility of such evidence is to be made by the judge and not the jury. *United States v. James, supra; United States v. Vinson*, 606 F.2d 149, 152 (6th Cir. 1979); *United States v. Bell*, 573 F.2d 1040, 1043 (8th Cir. 1978). The rationale for this finding has been Federal Rule of Evidence 104(a) which provides that the Court shall determine questions involving the admissibility of evidence. In so holding, the Courts have specifically excluded Federal Rule of Evidence 104(b), allowing the jury to make determinations of relevancy when conditioned on fact from consideration in this situation. The reason for this holding was the fear that great prejudice might inhere to a defendant, if the determination of admissibility of evidence was left to the jury, which would also determine the issue of guilt or innocence. *United States v. James, supra.*

The circuits have differed, however, on what standard of proof to apply. In *United States v. James, supra*, the Fifth Circuit relied on the Supreme Court holding in *United States v. Nixon*, 418 U.S. 638 (1974) and held that there must be substantial, independent evidence of a conspiracy, before co-conspirators hearsay declarations can

be submitted to the jury. This standard was adopted so as to insure "adequate protection to the defendant against whom the evidence is offered, yet not so high as to exclude trustworthy relevant evidence." *United States v. James, supra* at 580.

The Fifth Circuit however further held that at the conclusion of the evidence, upon proper motion, the trial court must determine as a factual matter, whether the prosecution has shown by a preponderance of the evidence, those matters necessary for co-conspirator hearsay to be admitted. This rationale for a double standard of admissibility was the desire that co-conspirator hearsay statements: (1) not be admitted until properly authenticated by substantial independent evidence and (2) that they not remain in the proof to be submitted to the jury unless their admissibility is established by a preponderance of the evidence. *United States v. James, supra* at p. 583.

The unique standards enunciated by the Court in *James* led them to conclude that a preferred order of proof existed so that the district court should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of co-conspirators. The rationale for this preferred order of proof was offered in *United States v. Macklin*, 573 F.2d 1046 (8th Cir. 1978), which states that the procedure will avoid the "danger that hearsay will be admitted in anticipation of a later showing of conspiracy that never materializes." at p. 1049. This preferred order of proof has also been adopted by the Third Circuit in *United States v. Continental Group, Inc.*, 603 F.2d 444, 457 (3rd Cir. 1979).

Other circuits, however, have held otherwise as to the

proper standard to apply and thus as to whether there is a preferred order of proof. In *United States v. Jones*, 542 F.2d 186, 203 (4th Cir. 1976), the Court simply noted that the Judge need determine only if there was a fair preponderance of independent non-hearsay evidence, before submitting it to the jury. Because the Court held that only one determination of admissibility (as opposed to the two suggested by the Fifth Circuit) need be made, it was held that a preliminary hearing would be superfluous, as it would consider the same matters to be addressed at trial. Accordingly, it was held that a trial judge may go ahead and admit the hearsay evidence, subject to it being "connected up" in a later display of its admissibility. *United States v. McCormick*, 565 F. 2d 286, 289 (4th Cir. 1977).

In so holding, the courts have indicated that the interest in efficiency overweighs the possible danger of hearsay evidence before the jury. Courts in short are reluctant to hold "mini-hearings" which would necessitate government proof of conspiracy which would need be repeated at trial. Yet the efficiency argument is a two-edged sword as inevitably there will be a serious waste of time, energy and effort when a mistrial is necessitated by the government's failure to put forth sufficient independent evidence of a conspiracy. *United States v. James, supra.* In addition, judges may find it easier to conclude a weak government case before the striking of a jury, than afterwards, especially when the factual determination they must make is similar to the issue presented to the jury.

The case at hand is a good example of what happens when the loss of efficiency becomes regarded as more significant than possible prejudice to the criminal defendant. Here a close case was presented to the jury as to whether

Petitioner was a member of the conspiracy in question. None of the numerous co-conspirators who testified at the trial were able to state that they were familiar with, or for that matter had ever seen or spoken previously with Petitioner. (R-48-49, R-60, R-103, R-108, R-113). Nor were they further able to state that Petitioner was involved in any way with the transportation, sale or delivery of the controlled substance in question. (R-54, R-60, R-73, R-101, R-113). Indeed the evidence showed only that he was present in the relevant apartment during the transaction, and that he in no way participated in, spoke about, or even observed the transfer of the drugs. (R-54, R-60, R-108). Accordingly, it was necessary to the government's case to present evidence connecting Petitioner with Rutherford, the absent co-conspirator and for this purpose the statements of Rutherford were advanced.

Obviously, under these circumstances, the statements of co-conspirator Rutherford were vital to proving that Petitioner was a member of the conspiracy. However, for purposes of allowing the co-conspirator hearsay, it was necessary that the trial judge make a determination as to whether the Petitioner was a member of the conspiracy absent and independent of the hearsay statements. Petitioner asserts that this independent decision can only be properly made in a preliminary hearing.

The opinion of the Fourth Circuit in regard to this issue indicated that a pretrial hearing was not necessary where the fact of a conspiracy was relatively undisputed and the principal issue was whether the Petitioner was a knowing member of it. This overlooks, however, the function of the trial judge who is to determine what is and is not admissible for consideration by the jury in regard to

the question of whether the Petitioner was a knowing member of the conspiracy.

The danger of course, in a case such as this, is that the judge will abdicate his responsibility to the jury in regard to the question of admissibility, because the factual matters necessary for such a decision are similar to what must be presented to the jury in regard to guilt or innocence. However what the judge ultimately rules on is different from what the jury rules on and indeed can determine exactly what the jury hears. The Fifth Circuit recognized this in *James* and accordingly adopted the substantial, independent evidence test, because they were aware that the question they dealt with concerned issues of admissibility and not those of guilt or innocence. Accordingly, the Fifth Circuit adopted a test balancing the necessity for admissibility and not a test for determination of whether a motion for mistrial should be granted.

Confusion is still apparent in the Fourth Circuit however, since they wish to apply one single test to both questions, as the principal factual issue of both questions is whether the Petitioner was a knowing member of the conspiracy. By requiring a preliminary hearing whenever possible, issues of admissibility could be resolved by the Court before submission of any hearsay evidence to the jury, which would eliminate prejudice to the defendants. It would also eliminate confusion among trial judges and prevent bootstrapping of evidence and further prevent abdication by judges of their judicial responsibility. Accordingly, this petition should be granted so that the Court can consider whether a preliminary hearing should be held before allowing evidence to be admissible.

CONCLUSION

Based on the foregoing reasons, the Petitioner contends that the Fourth Circuit Court of Appeals misapplied controlling authority to the circumstances involved in Petitioner's situation. Therefore, a Writ of Certiorari should issue to review the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted,

GARLAND, NUCKOLLS, KADISH,
MARTIN & CATTS, P.C.

BY: /s/ JOHN A. NUCKOLLS
JOHN A. NUCKOLLS

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the written Petition for a Writ of Certiorari upon Thomas P. Simpson, Assistant United States Attorney, P. O. Box 2266, Columbia, South Carolina 29202, by depositing same in the United States mail with adequate postage thereon to assure delivery.

This 9th day of April, 1980.

BY: /s/ JOHN A. NUCKOLLS
JOHN A. NUCKOLLS

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

79-5121

UNITED STATES OF AMERICA,
Appellee,

v.

HOMER THEODORE TENCH,
Appellant.

Appeal from the United States District Court for the District of South Carolina, at Greenville.
J. Robert Martin, Jr., District Judge.

Argued January 10, 1980 Decided February 8, 1980

Before WINTER and RUSSELL, Circuit Judges, and JONES, District Judge.*

(John A. Nuckolls, Garland, Nuckolls & Kadish, P.A. on brief) for Appellant; (Thomas E. Lydon, Jr., U. S. Attorney, Thomas P. Simpson, Assistant U. S. Attorney on brief) for Appellee.

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*Shirley B. Jones, United States District Judge for the District of Maryland, sitting by designation.

PER CURIAM:

Convicted of conspiring to possess cocaine with intent to distribute and aiding and abetting both the possession of cocaine with intent to distribute and its distribution, Homer Theodore Tench appeals. He advances several grounds for reversing the judgment entered on his conviction, but we find none of them meritorious.

We think that the evidence adduced by the government was sufficient to justify the denial of defendant's motion for a judgment of acquittal at the conclusion of the government's case, and we think the evidence legally sufficient at the conclusion of the entire case to submit the issue of defendant's guilt or innocence to the jury. The jury's determination that defendant was guilty as charged as a firm evidentiary base.

We do not think that Federal Evidence Rule 104 required the district judge to conduct a pretrial hearing on the existence of a conspiracy, especially here, where the fact of a conspiracy was relatively undisputed and the principal issue was whether this defendant was a knowing member of it.

Our conclusions with respect to the sufficiency of the evidence and the absence of a requirement for a pretrial hearing to determine the existence of a conspiracy combine to answer defendant's argument that hearsay evidence was improperly admitted against him. The defendant was a member of the conspiracy, and the statements and actions of his coconspirators were therefore admissible to prove his guilt.

Read as a whole, we think that the charge to the jury was unexceptionable.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Filed March 11, 1980, U.S. Court of Appeals, Fourth Circuit]

No. 79-5121

UNITED STATES OF AMERICA,

Appellee,

versus

HOMER THEODORE TENCH,

Appellant.

ORDER

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Winter, with the concurrence of Judge Russell and Judge Jones.

For the Court,

/s/ WILLIAM K. SLATE, II
CLERK